

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY FELTON MORGAN,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2003

No. 243332  
Saginaw Circuit Court  
LC No. 01-020508-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of two counts of first-degree criminal sexual conduct (CSC I) (sexual penetration with a person between the ages of thirteen and sixteen who is a member of the same household as the defendant), MCL 750.520(b)(1)(b)(i); four additional counts of CSC I (sexual penetration where the actor causes personal injury to the victim and force or coercion is used to accomplish the penetration), MCL 750.520(b)(1)(f); one count of extortion, MCL 750.213; one count felonious assault, MCL 750.82; one count of possession of a firearm by a felon,<sup>1</sup> MCL 750. 224(f); and one count of possession of a firearm during the course of a felony, MCL 750. 227(b)(a). On appeal defendant claims he was denied the effective assistance of counsel at trial. We find defendant's arguments unpersuasive after reviewing the record. We affirm.

To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation "fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). A defendant must also affirmatively show that counsel's objectively unreasonable representation was so prejudicial that the defendant was deprived a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant first argues his defense counsel failed to move for severance of all unrelated offenses pursuant to MCR 6.120 and *People v Tobey*, 401 Mich 141, 151; 257 NW2d 537

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<sup>1</sup> At trial, defendant stipulated that he was convicted of breaking and entering in 1986.

(1977). Defendant contends the offenses should have been severed by victim, and failure to do so yielded an unreliable result. We disagree.

There is a strong presumption that a trial counsel's actions are sound trial strategy. *People v Stammer*, 179 Mich App 432, 438; 446 Mich App 312 (1989). Further, this Court does not substitute its judgment for that of defense counsels with regard to decisions of trial strategy or assess defense counsel's performance with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). This Court has held that counsel's decision to move for severance may be based on sound trial strategy. *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987).

Defendant has not provided us with any evidence to lead us to believe that the failure to move for severance yielded an unreliable result. For this reason, we find that defendant has not overcome the presumption of effective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); see also *People v Thompson*, 410 Mich 66, 71; 299 NW2d 343 (1980). Defendant has failed to establish that counsel's choice constituted error or, even assuming error, that error prejudiced defendant to the extent that his conviction should be reversed. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

Defendant next argues that defense counsel's failure to object to numerous incidents of excluded other-acts evidence amounted to ineffective assistance of counsel. We disagree.

Claims of ineffective assistance of counsel based on counsel's failure to object, which could not have affected defendant's chances for acquittal, are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Here, there was vast admissible testimony adduced at trial concerning defendant's guilt, that substantially outweighed the few brief references to defendant's other uncharged acts. In fact, all three witnesses unequivocally testified to the crimes they experienced at the hands of defendant. Defendant has not shown that the brief and limited other-acts evidence created a reasonable probability that the outcome of the trial would have been different. Defendant failed to show prejudice resulting from counsel's failure to object where there was ample other evidence to prove the defendant's guilt. *People v Launsbury*, 217 Mich App 358, 361-362 NW2d 460 (1996).

Defendant also claims that because this inadmissible other-acts evidence was revealed to the jury, defense counsel was ineffective for failure to move for a mistrial. We disagree.

"It is well settled that the grant or denial of a mistrial is within the sound discretion of the trial court." *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). Because this issue was not raised during the trial, the court did not have an opportunity to make a determination. Typically, mistrials are not granted where any error could have been adequately addressed by a curative instruction. *People v Stewart*, 199 Mich App 199, 200; 500 NW2d 756 (1993). Before defendant was sentenced, defense counsel moved for a new trial on the ground that other-acts evidence was admitted into evidence. The trial court denied the motion, stating that the evidence preponderated heavily toward defendant's guilt and the prosecutor's questioning did not violate any of the court's orders concerning MRE 404(b) evidence. We find this denial of a new trial supports the likelihood that even if defense counsel had moved for a mistrial, it would have been denied. We also find upon reviewing the record that the trial court likely would have denied defendant's motion for a mistrial due to the limited nature of the other-

acts evidence when compared to the substantial weight of admissible evidence. Therefore, defendant has shown no prejudice.

Defendant's last claim is that defense counsel failed to request a limiting instruction for the excluded other-acts evidence and for defendant's prior conviction of breaking and entering. We disagree.

If other acts, crimes, or wrongs evidence is admitted into evidence, on request, the trial court may provide a limiting instruction. *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1994). Defendant has not overcome the strong presumption that his trial counsel's failure to request a limiting instruction was sound trial strategy. It is reasonable that defendant's counsel made a tactical decision not to repeatedly highlight defendant's other criminal sexual indiscretions for the jury, considering the fact that the testimonial evidence was minimal, brief, and sprinkled throughout numerous days of testimony. This Court does not substitute its judgment for that of defense counsels with regard to decisions of trial strategy or assess defense counsel's performance with the benefit of hindsight. *Rice (On Remand)*, *supra* at 445.

Regarding defendant's stipulated prior conviction of breaking and entering, again, we find that defendant has not overcome the presumption that the decision not to highlight defendant's criminal history was sound legal strategy. The offense happened sixteen years before the instant offenses. It is reasonable to conclude that defense counsel's decision not to request an instruction limiting how the jury should interpret the prior conviction was sound legal strategy. Every mention of the conviction could have highlighted the fact that defendant was a convicted felon.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio